SUPREME COURT, U.S.
FILED
JAN 19 1994
OFFICE OF THE CLERK

No. 93-896

SUPREME COURT OF THE UNITED STATES
October Term 1993

SHANTEE MONGA, and,
DHARAM DEV MONGA
Petitioners

v.

GLOVER LANDING CONDOMINIUM TRUST;
MARVIN FRANK, individually and as Chairman of
the Board of Governors; MARY E. HESSION,
individually and as Manager,
Respondents

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

REPLY TO BRIEF IN OPPOSITION

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ERRATA

Petitioners submit the following short list of errors noted in their Petition and apologize for any inconvenience this may have caused the Court:

Page 2 para. 4 Replace March 13, 1993 with March 1, 1993
Page 24 para. 1 Replace Sec. 1983 with Sec. 1982
Page 27 para. 3 Replace 489 F.2d with 489 N.E.2d

I. INTRODUCTION

Respondents have mischaracterized the facts of the district court's dismissal. The record shows that petitioners were prepared for trial as early as January 6, 1992 when they appeared in court on the first scheduled trial date. At the district court's own initiative, trial was rescheduled for February 3, 1992. On February 3, 1992 Mr. Monga appeared but could not proceed as his key material witness was not present to testify due to medical reasons. The district court dismissed the lawsuit after it denied Mr. Monga's oral motion to continue the trial for a short time until the witness could return to Boston to testify.

Another distortion is respondents' attempt to create the impression that the fee application is adequately supported. A cursory review shows that the fee application is deficient as a matter of law. For example, respondents failed to provide a single voucher for $19,602.06 they claim to incur in costs.

Claiming non availability, respondents also failed to provide contemporaneous records or billing summaries for the fifteen (15) month period from November 1988 through January 1991. Although respondents allege to have incurred $69,287.50 in fees for this period, neither the number of hours nor the hourly rates were furnished. Names of the lawyers and dates on which services were rendered are absent. Description of the tasks performed is missing. See, also, Petition at 6-9.

Furthermore, respondents have misstated petitioners' position regarding the unreasonableness of the fees. See, Opposition Brief at 7 n. 3. Petitioners do

not contend, as respondents erroneously allege, that an award of fees must be limited to costs specifically incurred in defense of particular acts and may not extend to the whole cost of defense for it to be reasonable. As respondents are fully aware, petitioners contend that the total fees and costs of $301,709.56 are unreasonable on their face because of respondents' numerous excesses, among them, 1) exorbitant amounts expended on their summary judgment motion; 2) excessive amounts expended on trial preparation; 3) exorbitant attorney and paralegal rates charged; and 4) excessive costs in general. See, Petition at 6-9 and 16-22.

Although petitioners addressed at length the unreasonableness of fees, respondents have failed to deny this claim. Respondents have also failed to deny petitioners' assertion that a substantial portion of the fee award actually goes into respondents' counsels' pockets as a windfall and not to the respondents who were never billed the total fees and costs of $301,709.56. See, Petition at 9.

II. REASONS FOR GRANTING THE WRIT

A. Respondents Have Failed To Show That Petitioners Waived Their Rights.

Respondents question petitioners' claim that failure to raise issues in the district court was due to inadvertence or oversight. Respondents speculate that petitioners' failure to seek relief in the district court must have been a by-pass strategy. See, Opposition Brief at 5, n. 1. Respondents' self-serving inference is counterintuitive. Common sense shows that petitioners had nothing to gain from by-passing the district court and gambling on having a judgment in

excess of $300,000.00 rendered against them.[1] All actions undertaken by petitioners since the district court's March 1992 order for fees (including prompt filings of the notice of appeal and the appeals brief containing meritorious arguments) support petitioners' claim that, being inexperienced pro se petitioners, their failure to oppose was inadvertent and was not interposed for delay. Without citing any authority, respondents additionally suggest that inadvertence is not legally relevant. By resorting to conjecture, respondents have completely ignored cases cited in the Petition. *See, e.g., Johnson v. United States*, 318 U.S. 189, 200 (1943) which supports the view that regarding waiver, inadvertence or oversight are important considerations. Respondents' further argument that the record does not support a finding of inadvertence is also misplaced. The record is completely silent in this regard and offers no basis for the First Circuit's presumption of waiver under the circumstances. The court's presumption of waiver on a silent record resulting in deprivation of important fundamental rights is in conflict with the Supreme Court's opinion in *Carnley v. Cochran*, 369 U.S. 506, 516 (1961).

On the one hand respondents have accepted petitioners' argument that the district court's allowance of their fee application in full without

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1. In their appellate brief, petitioners devoted over nineteen (19) pages of factual and legal arguments showing petitioners' lawsuit was meritorious and that the fee award was improper. Additional fifteen (15) pages supported the argument that the fees were grossly excessive. These arguments remain uncontroverted and are clearly meritorious. A by-pass under these circumstances is even less plausible.

indicating the legal authority is in conflict with *Foster v. Mydas Associates, Inc.*, 943 F.2d 139, 141-143 (1st Cir. 1991). See, Petition at 24-25. On the other hand respondents argue that there is no intra-circuit conflict or conflict between circuits. Offering no support for their position, respondents instead strain to distinguish the following three First Circuit cases: *Gabriele v. Southworth*, 712 F.2d 1505, 1507 (1st Cir. 1983); *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984); and *Foley v. Lowell*, 948 F.2d 10, 19 (1st Cir. 1991). Respondents contend that these decisions cannot be read to suggest that the district court is required to alter an unopposed fee request. See, Opposition Brief at 8-9. Respondents' argument is untenable. The district court is required to award only reasonable fees. If the fee application is excessive, the district court must trim it as illustrated by these three cases which encompass facts very similar, if not identical, to petitioners' case.

Inspite of the remarkable similarities, and notwithstanding that the fee award against petitioners exceeds the combined fees in all of the above three cases by an amount well in excess of $100,000.00, the First Circuit ignored its own precedence, presumed waiver, and cited a conflicting Third Circuit decision in *McDonald v. McCarthy*, 966 F.2d 112 (3rd Cir. 1992) to support its position. *McDonald* is also in conflict with *Strand v. Herrick and Smith*, 489 N.E 2d 179, 185 (Mass. 1986), a Massachusetts Supreme Judicial Court decision regarding award of fees under the Massachusetts Fee Statute. See, Petition at 27. Such departure from the usual course of proceedings calls for an exercise of this Court's supervision.

That the district court has discretion to award only reasonable fees is clear from the plain language of the fee shifting statutes and the rule under which respondents sought fees. In order to exercise sound discretion and award reasonable fees, the district court (and by corollary the appellate court) has "the duty ... to assure that consistent standards apply throughout the circuit." *Hamilton v. Daley*, 777 F.2d at 1212. *Also, see, U.S. v. Metropolitan Dist. Comm'n*, 847 F.2d at 17 where it was stated that "the court has a right - indeed, a duty - to see whether counsel substantially exceeded the bounds of reasonable effort ... If so, the court must act."

The presumption of an absolute waiver in the instant case shows that the First Circuit has treated the post trial fee motion as if it were an ordinary triable matter subject to the traditional adversial process, an approach which flies squarely in the face of the First Circuit's opinions in *Gabriele, Wojtkowski and Foley*. For example, in *Gabriele, supra*, at 1507 the First Circuit held that "fee determinations are not resolvable solely under adversary system procedures ... [and that] claims are subject not only to testing by adversaries but to the independent review of a court."

In their effort to justify the First Circuit's presumption of waiver, respondents rely on inapplicable cases which deal primarily with trial settings. Such cases are distinguishable as this case involves a post trial fee motion. For example, *Thomas v. Arn*, 474 U.S. 140, 148 (1985), a case cited by respondents, involves a statutory waiver in a criminal trial and has no relationship with the judicially constructed waiver where, as here, presumption of waiver is subject to abuse of discretion standards.

In their tenuous effort to buttress the district court's allowance of their fee motion in full, respondents also cite the Third Circuit decision in *McDonald, supra*. Despite First Circuit precedence in the same matter, respondents insist that the Third Circuit's decision in *McDonald* should be the law in this First Circuit case. See, Opposition Brief at 7-8. *McDonald* is in direct conflict with the decisions of the First Circuit and the Massachusetts Judicial Court. It is important that this Court resolve these conflicts to settle this area of law. Such a resolution will also be consistent with petitioners' right to due process and will prevent injustice inherent in the imposition of unreasonable penalties.

B. The First Circuit's Decision And The District Court's Award Violate Supreme Court Decisions

Not only is the First Circuit's decision in the instant case in conflict with *Carnley, supra*, and its own prior decisions, but the district court's fee sanction is also violative of *Chambers v. NASCO, Inc.*, 111 S. Ct. 2123 (1991), a case relied on by respondents. Unfortunately for respondents, *Chambers* is readily distinguishable as a matter of fact; as a matter of law, it actually undercuts their position. *Chambers* explicitly requires that a specific finding of bad faith be made by the district court prior to imposing sanctions under its inherent power and then only in circumstances where the statute or the rules are not otherwise "up to the task". *Id.*, at 2136. *See*, also, *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1977) which requires the district court to make an explicit finding that the lawsuit was "frivolous, unreasonable, or without foundation ..."

The record shows that the district court made no finding whatsoever merely stating in its footnote endorsement that "[N]o opposition being filed, the court grants defendants' motion as reasonable fees and costs." Respondents have not, and cannot show that the district court's footnote order comes even remotely close to meeting the *Chambers* and *Christianburg* standards. In fact, the district court's failure to even indicate whether it was sanctioning petitioners under its inherent power deprived petitioners the basic right to due process mandated by *Chambers*. Also, by failing to make such findings and by failing to indicate the authority under which it granted respondents' fee application in full, the district court totally ignored the Supreme Court's requirement in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1982) with respect to findings. It also ignored the First Circuit's mandate in *Foster*, 943 F.2d, at 141-143 with respect to the legal authority used to grant fees.

Respondents' argument that they have no obligation to support their claim that the fees requested meet the reasonableness standard is contrary to the law enunciated by the Supreme Court. In *Blum v. Stenson*, 465 U.S. 886, 896 n. 11 (1983) it was noted that federal courts "required prevailing attorneys to justify the reasonableness of the requested rate or rates" by producing "satisfactory evidence - in addition to the attorney's own affidavits - that the requested rates" are reasonable. Respondents did nothing to show that the rates are reasonable. They simply stated that the rates charged are their customary billing rates. This does not even come close to meeting the reasonableness requirement.

C. Public Policy Is An Important Consideration In Awarding Fees

Respondents assert that petitioners' public policy arguments are not supported by law or facts. Respondents' position is totally incorrect. The underlying rationale in fee shifting statutes show that public policy is an important consideration in awarding attorneys' fees.

Public policy becomes even more important where, as here, the fee award is unjustified and is unreasonable on its face. In fact, the award of $301,709.56 has been so arbitrarily granted that it even includes fees which had previously been denied by both the First Circuit and the district court.[2] Had the First Circuit considered petitioners' meritorious arguments, as it should have, it would have recognized that respondents' fee petition includes fees which were previously denied by the same two courts. Respondents are collaterally estopped from seeking such fees and the district court's award of such fees is subject to res judicata. It is incomprehensible to deny existence of policy interest when a substantial portion of the fee award actually goes into counsels' pockets as a windfall and not to the litigants. See, Petition at 9.

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2. Respondents had sought fees for opposing petitioners' successful appeal of the June 1989 dismissal of the lawsuit by the same district court. Said request was denied by both the First Circuit and the district court in early 1991. See Petition at 3.

D. Petitioners' Lawsuit Is Meritorious. No Finding To The Contrary Has Been Made

Although it is uncontroverted that the lower court has in effect "defaulted" petitioners, respondents have strained to create the impression that there were findings by the court of "vexatious conduct" and "groundless litigation" on petitioners' part. See, Opposition Brief at 7, n.3. No such findings were ever made on the merits. The record shows that the district court made no findings whatsoever before awarding fees and that the appellate court neither considered petitioners' meritorious arguments nor the facts refuting respondents' bald allegations. In effect, petitioners have been precluded from their day in court to argue the merits of their opposition to the fees. The First Circuit's opinion shows that the court presumed absolute waiver, simply paraphrased respondents' unsubstantiated allegations in the fee application, and failed to take into consideration any arguments in petitioners' appellate brief. See Pet.App.at 6-7.

The record shows that petitioners' lawsuit was well grounded in fact and in law. Not only had petitioners established a prima facie case but they also successfully survived a summary judgment motion. Furthermore, in accordance with *Hamilton v. Daley*, *infra*, based on the time and effort respondents' counsels claim to have expended in defending said lawsuit, petitioners' lawsuit cannot be baseless as alleged. *See*, *Hamilton v. Daley*, 777 F.2d 1207, 1214 n.7 (7th Cir. 1985) where the court stated that "Indeed the more time a defendant spends in defending a Section 1983 case, the less likely it is that the case is frivolous ...".

As to the unreasonableness of the fees, the First Circuit failed to even conduct a threshold inquiry regarding petitioners' well substantiated and uncontradicted assertion that the fees awarded by the district court are unreasonable on their face.

E. Respondents Have Failed To Show That The First Circuit Did Not Abuse Its Discretion In Presuming Waiver Regarding Joint And Several Liability

Contrary to respondents' statements, the record is clear that the First Circuit did not review, among others, petitioners' objections to the district court's imposition of liability on Ms. Monga for the entire fees. Ms. Monga is neither a lawyer nor a citizen of the United States and cannot be legally responsible for such statutory fees. See, Petition at 23-24. The First Circuit's refusal to review this claim which is purely legal in nature is violative of *Furtado v. Bishop*, 635 F.2d 915, 920 (1st Cir. 1980) where the court articulated the standard of review to include errors of law (aside from abuse of discretion) committed by a district court.

In an attempt to distract this Court's attention from the merits of the issues presented by petitioners, respondents introduce irrelevant matter regarding breach of contract which is not in the record before this Court. See, Opposition Brief at 10. As can readily be ascertained from the Petition, no argument or facts have been advanced before this Court bearing on Ms. Monga's claims under a contract theory. Had respondents thought that Ms. Monga's damages under the contract claims were spurious, which Ms. Monga denies, they could have filed a simple motion to dismiss or included this claim in their summary

judgment motion on which they expended $77,964.00. Having failed to take this action, they cannot now be awarded fees in defending these claims[3]. As the Seventh Circuit made it clear in *Hamilton v. Daley*, 777 F.2d at 1214, "a defendant should pay its own fees in a Section 1983 suit that are as much a result of its own inaction as the plaintiff's unreasonableness."

F. Constitutional Considerations

Respondents erroneously claim in their Opposition Brief at 11 that petitioners "did not even raise these constitutional claims before the Court of Appeals until their *third* motion for reconsideration." In their appellate brief petitioners did present arguments relating to various issues of fundamental procedural fairness, the grossly excessive nature of the fees, and due process elements inherent in the imposition of excessive fees and failure to indicate the legal authority. These arguments amply address constitutional issues. Respondents are fully aware that the issues argued by the pro se petitioners in their appellate brief were remarkably similar to language regarding constitutional claims in their motion for reconsideration.

In response to petitioners' assertion that the $301,709.56 fee sanction violates the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause, respondents advance the argument that attorneys' fees which merely recompense a prevailing defendant in a civil rights lawsuit for its actual litigation costs reasonably incurred cannot satisfy the

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3. The same argument applies to respondents' baseless allegation regarding Ms. Monga under 42 U.S.C. Sec. 1982.

constitutional element of "excessiveness". See Opposition Brief at 12. Unfortunately for respondents, the legal standard of reasonableness of fees is not governed by what the lawyers claim they have expended. If that were the legal standard, then inefficient, incompetent or unethical lawyers would be entitled to claim whatever exorbitant fees they decide to seek. The federal appellate courts have unanimously held that reasonableness of fees incurred by a lawyer is determined by the court and not by the prevailing party or his counsel. *See, Blum v. Stenson*, 465 U.S., at 895 n. 11; *U.S. v. Metropolitan Dist. Com'n*, 847 F.2d 12, 17 (1st Cir. 1988); *King v. Greenblatt*, 560 F.2d 1024, 1027 (1st Cir. 1977). In the process of its determination, the district court is required to follow established guidelines and consider relevant factors to arrive at a reasonable fee, including the court's own personal knowledge and familiarity with prevailing rates in the area. *See, Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974); *Salvini v. Flushing Supplies Corp.*, 137 F.R.D. 190, 193 (D.Mass. 1991). No such determination was ever made by the district court nor were the relevant factors ever considered. Under these legal guidelines, fees which are grossly excessive in nature and unreasonable on their face, as is the case here, can fall into the realm of the Eighth Amendment and Due Process protections.[4]

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4. Petitioners contend that the actual fees incurred by respondents are far less than the fees claimed by respondents' counsels. See Petition at 9. It is interesting but not surprising that respondents have not, and cannot deny petitioners' assertion in this regard.

III. CONCLUSION

Petitioners respectfully request review on the Writ Of Certiorari based on the following considerations:

1. The First Circuit's decision in the instant case is in conflict with its own decisions in *Gabriele, Wojtkowski, and Foley*, and the decision of the Massachusetts Supreme Judicial Court in *Strand*;

2. The First Circuit's reliance on *McDonald*, a Third Circuit decision, is improper as *McDonald* is in conflict with the First Circuit's decisions in *Gabriele, Wojtkowski, and Foley* relating to the same matters;

3. The First Circuit's decision has resulted in a fee award which is unreasonable on its face and which constitutes an unmistakable windfall to respondents' counsels in conflict with decisions of this Court; and

4. The First Circuit's presumption of waiver under the circumstances, and the district court's grant of grossly excessive fees to civil rights defendants without indicating the legal basis, presents important issues of law and policy to warrant review.

Respectfully submitted,

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January 18, 1994